



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8
999 18TH STREET - SUITE 300
DENVER, CO 80202-2466
Phone 800-227-8917
<http://www.epa.gov/region08>

DOCKET NO.: FIFRA-08-2003-0016

IN THE MATTER OF:

JOHNS MANVILLE
717 Seventeenth Street
Denver, CO 80217

Respondent

)
)
)
)
)
)
)
)
)
)

FINAL ORDER

Pursuant to 40 C.F.R. § 22.18, of EPA's Consolidated Rules of Practice, the Consent Agreement resolving this matter is hereby approved and incorporated by reference into this Final Order. The Respondent is hereby **ORDERED** to comply with all of the terms of the Consent Agreement, effective immediately upon receipt by Respondents of this Consent Agreement and Final Order.

September 30, 2003

DATE

SIGNED

Alfred C. Smith
Regional Judicial Officer



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

Docket No. **FIFRA-08-2003-0016**

| | | |
|--------------------------|---|------------------------|
| IN THE MATTER OF: |) | |
| |) | |
| |) | |
| Johns Manville Int. Inc. | } | COMBINED COMPLAINT AND |
| 717 Seventeenth Street. | } | CONSENT AGREEMENT |
| Denver, Colorado 80217 | } | |
| |) | |
| Respondent | } | |
| |) | |

United States Environmental Protection Agency, Region 8 ("EPA" or "Complainant"), and Respondent, Johns Manville International, ("Respondent"), by their undersigned representatives, hereby consent and agree as follows:

I. PRELIMINARY STATEMENT

1. This matter is subject to 40 C.F.R. part 22. This combined Complaint and Consent Agreement ("Combined Consent Agreement") is entered into by the parties for the purpose of simultaneously commencing and amicably concluding this matter, as authorized by 40 C.F.R. § 22.13(b), and executed pursuant to 40 C.F.R. § 22.18(b)(2) and (3).
2. EPA and Respondent agree that EPA has jurisdiction over this matter pursuant to section 14 of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §1361. The supervisors in the Legal Enforcement Program and the

Technical Enforcement Program within the Office of Enforcement, Compliance and Environmental Justice, Region 8, EPA, have been duly authorized to institute this action.

3. Respondent admits the jurisdictional allegations contained herein and neither admits nor denies the specific factual allegations contained herein.
4. Respondent waives its right to a hearing before any tribunal, to contest any issue of law or fact set forth in this Consent Agreement.
5. EPA and Respondent agree that settlement of this matter is in the public interest, and EPA and Respondent agree that execution of this Combined Consent Agreement and issuance of a Final Order without further litigation and without adjudication of any issue of fact or law, is the most appropriate means of resolving this matter.
6. This Combined Consent Agreement, upon incorporation into a Final Order, applies to and is binding upon EPA and upon Respondent, and Respondent's officers, directors, employees, agents, successors and assigns. Any change in ownership or corporate status of Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter Respondent's responsibilities under this agreement.
7. This Combined Consent Agreement contains all terms of the settlement agreed to by the parties.

8. The EPA is authorized to seek enforcement in this case pursuant to section 14 of FIFRA, 7 U.S.C. §136l.

II. GENERAL ALLEGATIONS

9. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), provides that it shall be unlawful for any person in any State to distribute or sell to any person any pesticide that is not registered under section 136a of FIFRA, 7 U.S.C. §136a.
10. Johns Manville International, Incorporated, is located at 717 Seventeenth Street, Denver, Colorado, 80217.
11. Johns Manville International, Incorporated, operates a number of subsidiaries, including: Johns Manville Insulations Group, Commercial and Industrial Division, P.O. Box 5108, Denver, CO 80217-5108.
12. Johns Manville International, Incorporated, operates an additional subsidiary, specifically: Schuller International, Inc., 10100 West Ute Avenue, P.O. Box 625005, Littleton, CO 80162-5005.
13. On June 18, 2001, EPA Region 8 received a referral from EPA Region 4, regarding possible sales of an unregistered pesticide by Respondent. On June 26, 2001, EPA Region 8 reviewed Respondent's internet site, and observed that certain products offered for sale via that website appeared to make pesticidal claims. And again on May 6, 2002, EPA Region 8 reviewed Respondent's internet site, and observed that certain products offered for sale via that website appeared to make unauthorized pesticidal claims. On February 10, 2003, EPA Region 8 observed unauthorized

pesticidal claims being made on Respondent's website, and also received faxed sales materials from Respondent's website which make unauthorized pesticidal claims.

14. Johns Manville International, Incorporated, or its subsidiaries, or both, manufacture, distribute or sell the following pesticides or products, which, as part of their sale or distribution, contain unauthorized claims of pesticidal efficacy:

- a. Permacote® Linacoustic® Standard/HP Fiber Glass Duct Liner;
- b. SuperSeal® Coating Products;
- c. Exact-O-Kote® HVAC Equipment Liners;
- d. Tuf-Skin Rx™ HVAC Equipment Liners.

15. Generally, a claim to control, repel, mitigate, kill or destroy a microorganism is a pesticidal claim and requires compliance with section 3 of FIFRA, 7 U.S.C. § 136a.

16. EPA, in a Final Rule promulgated on May 4, 1988 in 53 Fed. Reg. 15977, and codified at 40 C.F.R. § 152.25, has published applicable criteria used to evaluate those products which are considered to be pesticides. Additionally, in that rule, EPA lists exemptions for certain products from pesticide registration requirements, and also describes procedures for registration, classification, cancellation, and suspension of pesticides.

17. 40 C.F.R. § 152.25 provides:

"The pesticides or classes of pesticides listed in this section have been determined to be of a character not requiring regulation under FIFRA,

and are therefore exempt from all provisions of FIFRA when intended for use and used, only in the manner specified.

(a) *Treated articles or substances.* An article or substance treated with, or containing, a pesticide to protect the article or substance itself (for example, paint treated with a pesticide to protect the paint coating, or wood products treated to protect the wood against insect or fungus infestation) if the pesticide is registered for such use."

III. SPECIFIC ALLEGATIONS

18. It is a violation of FIFRA and also unlawful conduct for any person in any State to distribute or sell to any person any pesticide that is not registered under section 136a of FIFRA, except to the extent that distribution or sale otherwise has been authorized by the EPA Administrator.
19. FIFRA provides that the term "distribute or sell" means "to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver." FIFRA sec. 2(gg), 7 U.S.C. § 136(gg).
20. This combined consent agreement alleges that Respondent failed to comply with section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by offering for sale those unregistered pesticidal products enumerated in paragraph 14 above, and for which Respondent made unauthorized pesticidal claims as a part of that products' sale and distribution.

IV. TERMS OF SETTLEMENT

21. Respondent has achieved compliance with the requirements that formed the basis of the counts alleged in the Complaint.
22. Pursuant to section 14 of FIFRA, 7 U.S.C. §1361, and based in part on the nature of the alleged violations and other relevant factors, EPA agrees that settlement payment from Respondent in the amount of FOURTEEN THOUSAND EIGHTY DOLLARS (\$14,080.00) is appropriate to resolve this action taking into consideration the nature of the allegations, and other relevant factors.
23. Within thirty days (30) of receipt of the Combined Consent Agreement and the Final Order issued by the Regional Judicial Officer in this matter, Respondent shall make the agreed settlement payment in the amount of FOURTEEN THOUSAND EIGHTY DOLLARS (\$14,080.00) by remitting a certified or cashier's check payable to "Treasurer, United States of America," in care of:

U. S. EPA, Region 8
(Regional Hearing Clerk)
Mellon Bank
P. O. Box 360859M
Pittsburgh, PA 15251

The payment must reference Respondent's name and facility

address, the EPA Docket Number of this action, and Respondent's Taxpayer Identification Number (T.I.N.). A copy of the check must be mailed simultaneously to the addressees listed below:

Regional Hearing Clerk
U.S. EPA, Region VIII (8RC)
999 18th Street, Suite 300
Denver, Co 80202-2466

(and)

Dana J. Stotsky
Senior Enforcement Attorney
U.S. EPA, Region VIII (8ENF-L)
999 18th Street, Suite 300
Denver, Co 80202-2466

24. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on a civil or stipulated penalty if the penalty is not paid when due. Interest will be assessed at the United States Treasury tax and loan rate in accordance with 4 C.F.R.

§102.13(c). A charge will be assessed to cover the costs of debt collection, including processing and handling costs and attorneys fees. In addition, a penalty charge of six (6) percent per year compounded annually will be assessed on any portion of the debt that remains delinquent more than ninety (90) days after payment is due. Any such penalty charge on the debt will accrue from the date the penalty payment becomes due and is not paid. 4 C.F.R. §§ 102.13(d) and (e). Respondent specifically agrees that should it be delinquent with any payment, interest due on the delinquent amount shall be calculated from the date of the first payment date. Such interest calculation is non-discretionary and required by federal government debt collection procedures.

25. This Agreement shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state or local law.
26. Failure by Respondent to comply with any of the terms of this Consent Agreement shall constitute a breach of the agreement and may result in referral of the matter to the Department of Justice for enforcement of this agreement and for such other relief as may be appropriate.
27. Nothing in this Consent Agreement shall be construed as a waiver by the U.S. EPA of its authority to seek costs or any appropriate penalty associated with any collection action instituted as a result of Respondent's failure to perform

pursuant to the terms of this Agreement.

28. Each undersigned representative of the parties to this Agreement certifies that he or she is fully authorized by the party represented to bind the parties to the terms and conditions of this Consent Agreement and to execute and legally bind that party to this Consent Agreement.
29. The parties agree to submit this Consent Agreement to the Regional Judicial Officer, with a request that it be incorporated into a Final Order.
30. This Agreement, upon incorporation into a Final Order by the Regional Judicial Officer and full satisfaction by the parties, shall be a complete, full and final settlement of the alleged violations set forth in this Consent Agreement.
31. This Combined Consent Agreement resolves Respondent's liability for the alleged violations and facts contained in this Combined Consent Agreement, and for associated federal civil penalties under section 14 of FIFRA, 7 U.S.C. § 136l. This Combined Consent Agreement shall not in any case affect EPA's right to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

32. Each party shall bear its own costs and attorneys fees in connection with all issues associated with this Agreement.

IN THE MATTER OF: Johns Manville International,
Docket No. **FIFRA-2003-08-0016**

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8,

OFFICE OF ENFORCEMENT, COMPLIANCE,
AND ENVIRONMENTAL JUSTICE,

Date: 9/30/03 By: David J. Janik
~~Michael T. Risner~~, Director
David J. Janik, Supervisory
Enforcement Attorney
Legal Enforcement Program

Date: 9/30/2003 By: Timothy Osag for/
Elisabeth Evans, Director
Technical Enforcement Program

Date: Sept. 30, 2003 By: SIGNED
Dana J. Stotsky
Senior Enforcement Attorney
Legal Enforcement Program
Colorado Bar # 14717
Phone: (303)-312-6905
FAX: (303) 312-6953

Johns Manville International.

Respondent.

Date: **September 29, 2003**

By: **SIGNED**

Bruce D. Ray
Associate General Counsel
Johns Manville
717 17th Street (80202)
P. O. Box 5108
Denver, CO 80217-5108
303 978-3527
303 810-9723 Cell
888 629-6374 Fax
rayb@jm.com

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **COMBINED COMPLAINT
CONSENT AGREEMENT/FINAL ORDER** in the
matter of **JOHNS MANVILLE, DOCKET NO.: FIFRA-
08-2003-0016** was filed with the Regional Hearing Clerk
on September 30, 2003.

Further, the undersigned certifies that a true and correct copy of the document was
delivered to Dana Stotsky, Enforcement Attorney, U.S.
EPA - Region 8, 999 18th Street - Suite 300, CO
80202-2466. True and correct copies of the
aforementioned document was placed in the United States
mail certified/return receipt on September 30, 2003 to:

Bruce D. Ray
Associate General Counsel
Johns Manville
717 17th Street
P. O. Box 5108
Denver, CO 80217-5108

September 30, 2003

SIGNED

Tina Artemis
Regional Hearing Clerk

